IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 18.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.423 of 1992

Subbaiya Gounder .. Appellant/ Defendant

vs.

1.M.Balasubramaniam (deceased)
2.Balaparuvatham
3.Ramasamy
4.Hariramakirshnan
5.Dhanarajalakshmi .. Respondents/ Plaintiff

RR2 to 5 brought on record as LRS
of the deceased sole respondent vide order
of Court dated 18.7.2006 made in
C.M.Ps.8294 to 8296/06

Prayer: This Appeal has been filed under Section 96 of C.P.C against the decree and Judgment dated 24.1.1992 passed in O.S.No.16/1990 on the file of the Subordinate Court, Dharapuram.

For Appellant : Mr. T.S.Sevagnanam
For Respondents 2 to 5 : Mr. R.Asokan

JUDGMENT

This Appeal has been preferred against the Decree and Judgment passed in O.S.No.16/1990 on the file of the Subordinate Court, Dharapuram.

2. On the basis of a promissory note dated 1.6.1987 for a sum of Rs.25,000/- the plaintiff has filed the suit for realization of the same from the Defendant with 12% interest and costs. The Defendant in his written statement has denied the execution of the suit promissory note. According to the Defendant the suit promissory note was executed some 15 years back by him to the father of the plaintiff and that there was no consideration passed on the suit promissory note. According to the Defendant the suit promissory note is a forged one and that it does not contain the signature of the Defendant. In the additional written statement

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the Defendant has raised a contention that during the life time of the father of the plaintiff the Defendant had executed some documents signing on stamp papers which were subsequently been forged by the plaintiff after the death of his father and that no consideration was passed on the suit promissory note. The plaintiff in his reply statement has denied the averments raised in the additional written statement filed by the Defendant.

3. On the above pleadings the learned trial judge had framed two issues and on the basis of the documentary evidence let in by both parties, the learned trial judge has come to a conclusion that the plaintiff has proved the case and has consequently decreed the suit as prayed for with costs.

4. Aggrieved by the findings of the learned trial judge the Defendant has preferred this Appeal.

5. Now the point for determination in this Appeal is whether the suit promissory note has been executed by the Defendant for consideration?

6.The point:-

6(a) Even though the Defendant in his earlier written statement has denied his signature in Ex.A.1-promissory note, in the additional written statement he has admitted his signature in Ex.A.1-promissory note. But he would contend that there was some transaction between him and the father of the plaintiff and at that time he had handedover some documents including white papers containing his signature on the revenue stamps, which were subsequently forged by the plaintiff and one such concocted document is Ex.A.1. But absolutely, apart from ipse dixit of the Defendant, there is no evidence on record to show that the Defendant had executed some documents, including unwritten papers containing his signature on the stamp papers, to the father of the plaintiff at any point of time. The written statement is silent with regard to the alleged transaction which was in existence between the Defendant and the father of the plaintiff. On the other hand, both in the additional written statement as well as in his evidence before the trial Court as D.W.1, the Defendant had categorically admitted that Ex.A.1 contains his signature. Under such circumstances, the presumption under Section 118(a) of the Negotiable Instrument Act, 1881, will be that consideration passed under Ex.A.1-promissory note. Section 118 of the Negotiable Instrument Act, 1881, runs as follows:

> "Presumptions as to negotiable Instruments:- Until the contrary is proved, the following presumptions shall be made :
>
> (a) of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument

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when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date: that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance: that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer: that every transfer of negotiable instrument was made before its maturity;

(e) as to order of indorsement: that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamp: that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course: that a lost promissory note, bill of exchange or cheque was duly stamped;

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden or proving that the holder is a holder in due course lies upon him."

Apart from Ex.A.1-promissory note the plaintiff has examined two witnesses on his side besides examining himself as P.W.1. P.W.2, the witness to Ex.A.1-promissory note, has deposed to the effect that after receiving Rs.25,000/- from the plaintiff, the Defendant signed in Ex.A.1-promissory note and that the Defendant alone had took him to the plaintiff for the purpose of executing Ex.A.1-promissory note. The learned trial Court has rightly observed in its Judgment that there was no motive attributed against P.W.2 to give false evidence against the Defendant. P.W.3 is the scribe of Ex.A.1. He has also corroborated the evidence of P.W.2 to the effect that consideration has been passed under Ex.A.1. The Defendant as D.W.1 has admitted that Ex.A.1 contains his signature.

6(b) The learned counsel appearing for the appellant relying on the decision reported in 1999(3) Supreme Court Cases 35 (Bharat Barrel & Drum Manufacturing Compnay Vs. Amin Chand Payrelal), contended that the presumption under Section 118 of the

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Negotiable Instrument Act is rebuttable and that in this case the Defendant has proved that consideration has not been passed and he would further contend that the rebuttable evidence of the Defendant can be let in either by direct evidence or by preponderance of probabilities showing that existence of consideration was improbable, doubtful or illegal. The facts of the said case are follows:

> "The parties to the litigation had been having business dealings and transactions with respect to import of steel including drum sheets. In or about August 1961, the Defendant claimed to have offered to arrange to import for the consideration of 10,160 metric tones of steel drum sheets from U.S.A. on the terms and conditions contained in the letter dated 10.8.1961. The plaintiff was alleged to have accepted the offer and stated that the shipment of the materials would have to be made within the validity period of import licence issued in the name of the plaintiff and that all requisite formalities at the level of the authorities concerned would have to be complied within the time. The Defendant claimed to have confirmed that the order placed by the plaintiff had been booked and requested the plaintiff to open the necessary letter of credit on the terms and conditions contained in the letter of the Defendant dated 15.09.1961. The total price of the goods to be imported under the said import licence and the aforesaid arrangement with the plaintiff was about Rs.55,30,000/-. The plaintiff through its Director, was stated to have represented to the Defendant in October 1961 that until and unless the assuracne or guarantee that deliveries would be made in time could be given, the letter of credit would not be opened by the plaintiff. The said director insisted that the Defendant should either give a guarantee or provide some security for the due performance by the Defendant of its obligation under the said arrangement for supply of goods under the letter of credit. It was further suggested that the Defendant should execute a promissory note for the sum of Rs.6,20,000/- by way of collateral security for payment to the plaintiff of damages, in any event, which the plaintiff might actually suffer in consequence of non-supply of the goods due to default on the part of the supplier. Eventually, the Defendant in order that its reputation in the foreign market and that the foreign suppliers might not be injured, was compelled to agree to execute a promissory note for Rs.6,20,000/- by way of collateral security. On his failure to repay the amount borrowed, the plaintiff-appellant filed a suit under Order XXXVII of the Code of Civil Procedure in the original side of the High Court

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of Calcutta. The respondent was granted leave to defend the suit by the trial judge. In the written statement filed, the respondent alleged that the promissory note had not been executed "for the value received" as mentioned therein but was executed by way of collateral security. The promissory note was stated to have thus been executed under such circumstances which were, in fact, intended to be collateral security. Due to freezing of lakes, the contract of import of steel drum sheets could not be performed and the same was cancelled with the appellant which absolved the Defendant-respondent from any liability arising out of and in relation to the document executed by him."

On appreciation of evidence led in that case the trial Judge held that promissory note was not executed by way of collateral security as alleged by the Defendant. But while answering Issue No.2, which dealt with passing of consideration under the promissory note, the trial judge has concluded that no consideration passed under the promissory note and the trial Judge ultimately dismissed the suit. Aggrieved by the Judgment of the trial Court, the plaintiff filed an Appeal before the Division Bench of the High Court. The larger Bench which dealt with the issue ultimately dismissed the Appeal. When the matter was agitated before the Honourable Apex Court, the ratio laid down by the Honourable Apex Court in the said suit is as follows:

"Once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The Defendant can prove the non-existence of a consideration by raising a probable defence. If the Defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the Defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the Defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff

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> would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The Court may not insist upon the Defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the Defendant has to bring on record such facts and circumstances upon consideration of which the Court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist.

In the said case, the Defendant was able to prove that the suit promissory note was executed only as a collateral security for the goods (steel including drum sheets) to be supplied by the Defendant. In that case the Defendant was able to prove that no consideration passed under the suit promissory note since it was executed only as a collateral security for the contract entered into between the parties therein. But that is not the case herein. The mere reading of Ex.A.1-promissory note will go to show that it was executed by the Defendant in favour of the plaintiff to meet the family expenses. There is absolutely no rebuttable evidence let in in this case by the Defendant to show that there was no consideration passed on Ex.A.1-promissory note and the suit promissory note was executed by the Defendant in favour of the plaintiff's father. It is the case of the Defendant in connection with some other transaction he had handedover some documents including unwritten papers containing his signature in revenue stamps, which were subsequently been forged by the plaintiff and one such document is Ex.A.1. But there is no evidence on record to show that the unwritten stamp papers containing the defendant's signature given to the father of the plaintiff were forged by the plaintiff. Under such circumstances, there is absolutely no rebuttable evidence let in by the Defendant in this case to convert the presumption under Section 118(a) of the Negotiable Instrument Act to presume that no consideration passed under Ex.A.1-promissory note. So the facts of the case reported in 1999(3) Supreme Court Cases 35 (Bharat Barrel & Drum Manufacturing Compnay Vs. Amin Chand Payrelal), will not be applicable to the present facts of the case.

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6(c) The learned counsel for the appellant also relied on the decision reported in 2001(1) CTC 281 (Mohammed Ali Vs. Abdul Sinab). The facts of the said case in brief are as follows:

> "The Defendant obtained a loan of Rs.9,000 on 2.10.1988 and another loan of Rs.9,000 on 7.10.1988 and executed promissory notes in favour of one Abdul Rafi. On 11.09.1989, the said Abdul Rafi assigned the right of collecting the same on the promissory notes in favour of the plaintiff. The Defendant obtained a loan of Rs.9,000 on 1.12.1988 and another Rs.9,000 on 25.12.1988 from one Mohammed Gani and executed promissory notes. These promissory notes were assigned by the said Mohammed Gani on 23.12.1989 in favour of the plaintiff. Besides these amounts, the Defendant received Rs.9,000 each on various dates, namely, 14.1.1989, 21.1.1989, 25.1.1989 and 29.1.1989 and executed promissory notes in favour of the plaintiff. Since these amounts were not paid, the appellant/plaintiff issued a notice on 26.12.1990. The Defendant sent a reply stating that he gave 10 signed blank promissory notes to one Basheer Ahmed on 7.1.1989, sicne as a subscriber of chits conducted by the said Basheer Ahmed, being the successful bidder, he took chit for Rs.45,000/- and by way of security to discharge the balance amount, he signed in those promissory notes and there is no relationship as creditor and debtor between them and as such, the plaintiff would not be entitled to the recovery of money.

The defence raised by the Defendant in that suit was that no consideration was passed under the suit promissory note and that the promissory notes were executed by him in favour of Basheer Ahmed, who had conducted chits and as a successful bidder in the auction, he took the chit for Rs.45,000/- and as a security he had executed the promissory note and no consideration passed under the promissory note. The trial Court dismissed the suit. But the first appellate Court allowed the Appeal. Hence a second Appeal had been filed before this Court. The substantial question of law dealt with in that second Appeal was,

> whether the lower appellant Court is right in drawing presumption under Section 118 of the Negotiable Instrument Act, which the facts of the case disproves the existence of debtor and creditor relationship?

Since the Defendant in that suit has rebutted the presumption under Section 118 of the Negotiable Instrument Act, the said second

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Appeal was dismissed confirming the order of the first appellant Court decreeing the suit.

6(d) As far as this case is concerned it is the definite case of the plaintiff that Ex.A.1 was executed by the Defendant in favour of the plaintiff for due consideration. On the other hand, it is the case of the Defendant that Ex.A.1 is a forged one. But in the evidence of the Defendant as D.W.1 and in the additional written statement filed by the Defendant, he has admitted his signature in Ex.A.1. The Defendant has failed to prove that Ex.A.1 is a forged document. Under such circumstances, the presumption under Section 118 of the Negotiable Instrument Act will squarely apply to the present facts of the case. Under such circumstances, I do not find any reason to interfere with the findings of the learned trial Judge to the fact that Ex.A.1 is supported by consideration. Point is answered accordingly.

7. In fine, there is no merit in the Appeal and the same is hereby dismissed with costs confirming the Decree and Judgment passed in O.S.No.16/1990 on the file of the Subordinate Court, Dharapuram.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To,

1. The Subordinate Judge,
Dharapuram.

2. the Record Keeper,
VR Section,
High Court, Madras.

1 cc to Mr.R. Asokan, Advocate, sr. 49433
1 cc to Mr.T.S. Sivagnanam, Advocate, SR. 49164

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